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In the Supreme Court of the United States

OCTOBER TERM, 1976

No. 76-981

CPC INTERNATIONAL INC., ET AL.,

Petitioners,

v.

DOUGLAS M. COSTLE, as Administrator,
Environmental Protection Agency, *et al.*,

Respondents.

On Petition For A Writ Of Certiorari To The United States Court Of Appeals For The Eighth Circuit

REPLY OF PETITIONERS

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The central issue in this petition was not resolved by this Court's decision in *E. I. du Pont de Nemours & Co.* v. *Train*, 45 U.S.L.W. 4212 (Nos. 75-978, etc., decided February 23, 1977). The issue is whether in new source standards for corn wet mills "EPA should provide an *excursion* provision that will offset the expected . . . violations." *FMC Corp.* v. *Train*, 539 F.2d 973, 986 (4th Cir. 1976) (emphasis added). The *du Pont* decision, however, makes the question of "excursions" one of considerable significance, because the Court held that the standards are "absolute prohibitions."

The thrust of EPA's position is that the Agency could decide to rely upon enforcement discretion or upon "a flexible policy of revising permit conditions under certain

circumstances" to account adequately for the inevitable occasions upon which the Agency's new source standards will be exceeded. (EPA's Memorandum, at 3.)[1] These occasions would arise because of the statistical method used by the Agency to derive the standards, and would occur at well-run plants without the fault of the plant operator.

Given the "absolute" nature of EPA's new source standards,[2] petitioners submit that EPA's response is not sufficient. Operators of new corn wet mills should not be forced to conduct their operations at the sufferance of the Administrator of EPA, being subject always to a benevolent Administrator's willingness to pardon certain "violations". Future Administrators may be less willing to accept the inevitability of certain violations. A plant's potential exposure in an enforcement action is large; the Act authorizes the imposition of awesome penalties. See §§ 309 and 505.

This case should be remanded for the court of appeals to reconsider the matter in light of the *du Pont* decision. As the Fourth Circuit said in its *FMC* opinion, "[p]lant owners should not be subject to sanctions when they are operating a proper treatment facility." *FMC Corp.* v. *Train*, 539 F.2d 973, 986 (4th Cir. 1976). See also *Essex Chemical Corp.* v. *Ruckelshaus*, 158 U.S. App. D.C. 360, 486 F.2d 427, 432-433 (1973), *cert. denied sub nom. Appalachian Power Co.* v. *Environmental Protection Agency*, 416 U.S. 969

[1] EPA also relies upon the assertion that new corn wet mills may avoid excursions "by applying available waste treatment technology." (EPA's Memorandum, at 3.) To some measure, the court of appeals accepted EPA's assertion that "many steps," left unidentified, were available to reduce effluent variability and thus excursions. (See 540 F.2d at 1337; Appendix A to Petition, at 14a.) EPA did not include any of these unidentified steps in "the best available demonstrated control technology" (§ 306(a)(1)) which it described for corn wet mills and upon which it relied, as it had to under the statute, to set the new source standards at issue here. Accordingly, the unspecified further steps deserve to be accorded no weight, and the court of appeals logically continued with its analysis on the basis that a certain number of occasions would arise where the EPA standards were exceeded in the absence of any fault by the plant operator. (540 F.2d at 1338; Appendix A to Petition, at 14a-15a.)

[2] *E. I. du Pont de Nemours & Co.* v. *Train*, 45 U.S.L.W. 4212, 4219 (Nos. 75-978, etc., decided February 23, 1977).

(1974) (air emission standards under the Clean Air Act for new sources).

Respectfully submitted,

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